

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

JOHN W. LINDSTROM,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

No. C 07-3050-MWB

**ORDER REGARDING PLAINTIFF'S  
APPLICATION FOR ATTORNEY  
FEES UNDER THE EQUAL ACCESS  
TO JUSTICE ACT**

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***I. INTRODUCTION***

On November 12, 2003, plaintiff John Lindstrom filed an application for disability benefits under the Social Security Disability Insurance program. This application was denied initially and on reconsideration. Lindstrom then requested and was provided a hearing on September 8, 2005. At this hearing, the Administrative Law Judge (ALJ) ruled against Lindstrom, finding that he was not disabled absent his alcoholism. Lindstrom appealed the ruling to the Appeals Council, which found on March 23, 2006, that his case should be remanded for another hearing in front of an ALJ. On August 15, 2006, Lindstrom was provided with another hearing, and, again, it was found that Lindstrom was not disabled. Lindstrom again appealed the unfavorable decision to the Appeals Council, but this time it denied his request for review. As a result, the ALJ's decision was a final decision of the Commissioner.

On July 25, 2007, Lindstrom filed a complaint in this court seeking review of the Commissioner's final decision denying him benefits (Doc. No. 1), and this court vacated and remanded the Commissioner's decision on September 29, 2008. Doc. No. 12. On December 8, 2008, Lindstrom filed his Application for Attorney Fees Under the Equal Access to Justice Act, which asked the court to award Lindstrom's attorney, Thomas Krause, a total of \$3,581.09 in attorney fees and costs—Lindstrom asked for \$3,231.09 in attorney fees and \$350.00 in costs, for the filing fee, pursuant to the Equal Access to Justice Act ("EAJA"). Doc. No. 14-1. In support of this request, Lindstrom provided the court with a table summarizing the fee request, a table summarizing the United States Department of Labor consumer price index for January through October of 2008, a declaration by Thomas A. Krause, an itemization of Krause's expended hours, and a consumer price index table. Doc. No. 14-2. The Commissioner filed a response on December 17, 2008, which does not object to Krause's receipt of attorney fees and the filing fee. Doc. No. 15.

## ***II. LEGAL STANDARDS***

Attorney fees may be awarded to a "prevailing party" in a social security appeal under the EAJA. 28 U.S.C. § 2412(d). The statute provides:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that *special circumstances* make an award unjust.

*Id.* (emphasis added). The Eighth Circuit Court of Appeals has had little occasion to elaborate on what constitutes “special circumstances.” *See Koss v. Sullivan*, 982 F.2d 1226, 1229 (8th Cir. 1993) (looking to see whether special circumstances make an award unjust, and finding none, but stating “the denial of fees to counsel whose efforts brought about the Secretary’s change of position is unjust”). However, the Eighth Circuit Court of Appeals has specifically addressed, many times, when a position is substantially justified. *See, e.g., Cornella v. Schweiker*, 728 F.2d 978, 981-982 (8th Cir. 1984); *Lauer v. Barnhart*, 321 F.3d 762, 764-65 (8th Cir. 2003).

A position enjoys substantial justification if it has a clearly reasonable basis in law and fact. Accordingly, the Commissioner can advance a losing position in the district court and still avoid the imposition of a fee award as long as the Commissioner’s position had a reasonable basis in law and fact. Further, a loss on the merits by the Commissioner does not give rise to a presumption that [he or] she lacked substantial justification for [his or] her position. The Commissioner does, however, at all times bear the burden to prove substantial justification.

*Goad v. Barnhart*, 398 F.3d 1021, 1025 (8th Cir. 2005) (citations omitted); *see Lauer*, 321 F.3d at 765 (recognizing “the overriding, fundamental principal that the government’s position must be well founded in fact to be substantially justified”); *Sawyers v. Shalala*, 990 F.2d 1033, 1034 (8th Cir. 1993) (“To be substantially justified, the [Commissioner] must show that [his] position was ‘justified to a degree that could satisfy a reasonable person.’” (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988))).

In order to obtain an award, the party must apply for the award “within thirty days of final judgment in the action” and “allege that the position of the United States was not substantially justified.” 28 U.S.C. § 2412(d)(1)(B). In *Scarborough v. Principi*, the

United States Supreme Court found that “the provision's 30-day deadline for fee applications and its application-content specifications are not properly typed ‘jurisdictional,’<sup>1</sup> but instead are “ancillary to the judgment of a court.” *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Therefore, the government can waive this requirement because it is present to protect the government’s interests. *See Vasquez v. Barnhart*, 459 F.Supp.2d 835, 836 (N.D.Iowa 2006).

If fees are appropriate, the reasonable hourly rate for such attorney fees are established by statute:

[A]ttorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A)(ii); see *Johnson v. Sullivan*, 919 F.2d 503, 505 (8th Cir. 1990)(holding that “where... an EAJA petitioner presents uncontested proof of an increase in the cost of living sufficient to justify hourly attorney’s fees of more than \$75 per hour[(the applicable statutory amount in the case)], enhanced fees should be awarded.”). Section 2412 also provides that “[f]ees and other expenses awarded under [subsection (d)] to a party shall be paid by any agency [(the Social Security Administration)] over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4).

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<sup>1</sup> Before *Scarborough v. Principi*, courts had repeatedly labeled the thirty day deadline as jurisdictional (*see Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1327 (8th Cir. 1983)) and that failing to comply with the thirty day requirement barred an award. *Premachandra v. Mitts*, 753 F.2d 635, 642 (8th Cir. 1985).

Filing fees and other costs may also be awarded under the EAJA to plaintiffs who prevail in social security cases. Section 2412 provides:

(a)(1) Except as otherwise specifically provided by statute, a *judgment for costs*, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any agency official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

*Id.* § 2412(a)(1) (emphasis added). Title 28, Section 1920 of the United States Code provides that “[f]ees of the clerk” and “[f]ees for exemplification and copies of papers necessarily obtained for use in the case” may be “tax[ed] as costs.” *Id.* § 1920(1). Section 2412 also directs that the “costs pursuant to subsection (a)” are paid by the Secretary of the United States Treasury. *See id.* § 2412(c)(1) (indicating that these costs are “paid as provided in section[] 2414”); *id.* § 2414 (stating the payment of final judgments “shall be made on settlements by the Secretary of the Treasury”); *see also* 31 U.S.C. § 1304(a)(1) (“Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . (1) the payment is not otherwise provided for. . . .”).

### ***III. LEGAL ANALYSIS***

The court finds that Lindstrom is a “prevailing party,” and that the Commissioner, by not objecting to—in fact, agreeing to—the payment of attorney fees in the amount of

\$3,231.09, has not met his burden of establishing either “substantial[] justi[cation]” or “special circumstances” to preclude an award of reasonable fees. See 28 U.S.C. § 2412(d)(1)(A). The court additionally finds that Lindstrom’s request is supported by “uncontested proof of an increase in the cost of living” to justify his hourly rate.<sup>2</sup> See *Johnson*, 919 F.2d at 505. Therefore, the court directs the payment of attorney fees to Krause.

Lindstrom’s application also requests \$350 for a filing fee. The court, having recognized that 28 U.S.C. § 2412(a)(1) provides for the payment of this fee and the Commissioner’s lack of objection to awarding the fee, directs the payment of the filing fee to Krause. The fee shall be paid by the Secretary of the United States Treasury pursuant to 28 U.S.C. § 2412(c)(1).

Lastly, the court must address Lindstrom’s request to have the attorney fees and filing fee paid directly to Krause, rather than to himself. The Eighth Circuit Court of Appeals has recently held that “EAJA attorneys’ fees are awarded to prevailing parties’ attorneys.” *Ratliff v. Astrue*, 540 F.3d 800, 802 (8th Cir. 2008). This rule prevents claimants’ creditors from reaching the fees, regardless of whether a prevailing party claimant has the government as a creditor, *see Id.* (citations omitted), or a third party. *See Id.* (citing *Curtis v. City of Des Moines*, 995 F.2d 125, 129 (8th Cir. 1993)). In this case, Lindstrom “request[ed] the Court award counsel... attorney fees.” Doc. No. 14-1. Although Lindstrom does not provide a reason for awarding the fees directly to Krause, the Commissioner joined in the request. The Commissioner, citing *Ratliff v. Astrue*, asked

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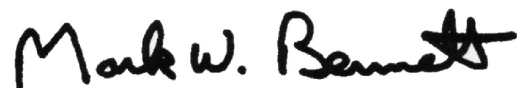
<sup>2</sup> Krause’s average hourly rate in 2007 and 2008 was \$166.43 per hour and \$173.49 per hour, respectively. Krause supported these rates in his Declaration of Thomas A. Krause. *See* Doc. No. 14-2.

“that the EAJA award be made payable to Thomas A. Krause, attorney for Plaintiff.”  
Doc. No. 15. Therefore, the court finds that the fees should be paid directly to Krause.

THEREFORE, Lindstrom’s Application for Attorney Fees Under the EAJA is **granted**, and the court awards attorney fees (**\$3,231.09**) and costs (**\$350**) in the total amount of **\$3,581.09** to be paid to Thomas Krause. The filing fee costs of \$350 shall be paid by the Department of the Treasury out of the Judgment Fund, and the remaining \$3,231.09 in fees shall be paid by the Social Security Administration.

**IT IS SO ORDERED.**

**DATED** this 5th day of January, 2009.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, slightly stylized font. The "M" is large and loops around the "a". The "W" is formed with two distinct peaks. The "Bennett" part is also cursive, with the "t" having a long, sweeping tail that extends to the right.

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MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA